DISCRIMINATION LAW:

EQUALITY IN THE PRIVATE SECTOR

2005-2006

Volume 1

Professor Denise Réaume

Faculty of Law
University of Toronto

DISCRIMINATION LAW:

EQUALITY IN THE PRIVATE SECTOR

2005-2006

Volume 1

Professor Denise Réaume

I am grateful for input over the years into the design of this course from Neena Gupta, Mark Hart, and Geri Sanson, and to Alison Gray and Revital Goldhar for their valuable research assistance.

DISCRIMINATION LAW:
EQUALITY IN THE PRIVATE SECTOR

2005-2006

Table of Contents

Volume 1

Note: It is often remarked upon that Human Rights Codes are quasi-constitutional statutes, and therefore should be given a large and liberal interpretation. For example, in *C.N. v. Canada (Canadian Human Rights Commission), (Action Travail des Femmes)*, [1987] 1 S.C.R. 1114, the Supreme Court summarized this interpretive stance as follows:

INTERPRETING HUMAN RIGHTS LEGISLATION ...

Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact. Although it may seem commonplace, it may be wise to remind ourselves of the statutory guidance given by the federal Interpretation Act which asserts that statutes are deemed to be remedial and are thus to be given such fair, large and liberal interpretation as will best ensure that their objects are attained. See s. 11 of the *Interpretation Act*, ..., as amended. As E. A. Driedger, *Construction of Statutes*, p. 87 has written:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

The purposes of the Act would appear to be patently obvious, in light of the powerful language of s. 2. In order to promote the goal of equal opportunity for each individual to achieve "the life that he or she is able and wishes to have", the Act seeks to prevent all "discriminatory practices" based, *inter alia*, on sex. It is the practice itself which is sought to be precluded. The purpose of the Act is not to punish wrongdoing but to prevent discrimination. ...

The first comprehensive judicial statement of the correct attitude towards the interpretation of human rights legislation can be found in *Heerspink*, ..., where Lamer J. emphasized that a human rights code "is not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law". This principle of interpretation was further articulated by McIntyre J., for a unanimous Court, in *Winnipeg School Division No. I v. Craton*, ...:

> Human rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such nature that it may not be altered, amended, or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement.

The emphasis upon the "special nature" of human rights enactments was a strong indication of the Court's general attitude to the interpretation of such legislation.

In *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, ..., the Court set out explicitly the governing principles in the interpretation of human rights statutes. Again writing for a unanimous Court, McIntyre J. held, at pp. 546-7:

> It is not, in my view, a sound approach to say that according to established rules of construction no broader meaning can be given to the Code than the narrowest interpretation of the words employed. The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human rights code the special nature and purpose of the enactment, ... and give it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary -- and it is for the courts to seek out its purpose and give it effect. The Code aims at the removal of discrimination.

...

On the other hand, the Court has also repeatedly warned against taking this too far. For example, in *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353, Chief Justice Lamer said,

> This interpretive approach does not give a board or court license to ignore the words of the *Act* in order to prevent discrimination whenever it is found. While this may be a laudable goal, the legislature has stated, through the limiting words in s. 3 [of the British Columbia *Human Rights Act*], that some relationships will not be subject to scrutiny under human rights legislation. It is the duty of boards and courts to give s. 3 a liberal and purposive construction, without reading the limiting words out of the *Act* or otherwise circumventing the intention of the legislature.

CHAPTER 2: DEFINING DISCRIMINATION

NOTE:

The antidiscrimination provisions of the Ontario Human Rights Code effectively created a new cause of action. It is useful to think of a discrimination complaint as being structured around three conceptual pillars. These are:

1. the grounds upon which an individual may not be denied a good or opportunity - or the **bases** of unlawful discrimination -,
2. the type of good, benefit, or opportunity whose pursuit is protected - or the **spheres** within which discrimination is prohibited -, and
3. the circumstances that make a denial unlawful - or what we might call the **fault** standard for discrimination.

This chapter of the materials begins our exploration of these pillars and the relationship between them. We start with some relatively simple paradigmatic fact situations to get a sense of the starting point in human rights adjudication. Then we will turn to some of the controversies over the prohibited grounds of discrimination covered by most Codes. This is followed by an examination of the doctrinal move from a focus on reasons to a focus on the effects of actions and policies. We round out the picture of the structure of a discrimination complaint with an examination of the spheres within which discrimination is prohibited.

A. "Equal Treatment without Discrimination *because of...*": Discrimination as Prohibited Reasons

Note: Central to the design of a new cause of action is a substantive account of the nature of the wrong – the kind of behaviour that counts as wrongful. This aspect of the cause of action must be tailored to the interest(s) to be protected, and will therefore be linked to our reasons for selecting certain grounds for discrimination as prohibited and selecting certain spheres to be governed by anti-discrimination norms. Yet, as Judith Keene points out (*Human Rights in Ontario*, 2nd edn., Toronto: Carswell, 1992, p. 5), the Ontario *Code* does not define "equal treatment without discrimination", the cornerstone concept of discrimination law. This has left it up to adjudicators – Boards of Inquiry or Tribunals, and judges – to fashion an account of what is the interest in equal treatment and what makes behaviour discriminatory and therefore unlawful.

If a discrimination complaint were a tort, this issue would correspond to the "standard of care" issue in tort. It may be profitable directly to compare the various standards of fault at work in tort law with the implicit understanding in discrimination law as to what makes discrimination unlawful or wrongful.

Equal Treatment without Discrimination "because of"...

One possible starting point for devising an account of what discrimination is focuses on the language typical of most Human Rights Codes guaranteeing the right to equal treatment without discrimination because of any of a number of prohibited grounds. Many cases turn on whether the Complainant can make the factual causal link between the behaviour of the Respondent and one of the prohibited grounds of discrimination. The assumption in these cases is that discrimination has something to do with the reasons for the Respondent's conduct. Ask yourself, as you read these cases

- Why do the Respondent's reasons matter – what does this tell us about the concept of discrimination in play?

- What does the adjudicator rely on to determine what the Respondent's reasons were?

Shakes v. Rex Pak Limited

(1981), 3 C.H.R.R. D/1001 (Ont. Bd.Inq. Ian Hunter)

Note: Florence Shakes responded to the respondent's add for assembly line workers at its food packaging plant. In her interview, Mrs. Shakes was asked whether she preferred to work the day or afternoon shift, and she expressed a preference for the former. When told there were fewer spots available on the day shift, she said she would work afternoons. The manager, Mr. Napier, told her he would keep her application on file and call her if she was needed. Mrs. Shakes left his office and another applicant, a white woman, went in to be interviewed. Mr Napier offered this applicant a job on the afternoon shift in the interview.

...

8916 The precise issue I must determine is this: From the evidence, has the Commission satisfied me on a balance of probabilities that Mr. Steve Napier refused to recruit Mrs. Florence Shakes for employment at Rex Pak Limited on 17 October 1979 because of her race and colour?

...

B. The Grounds Approach: Interpreting the Enumerated Grounds

Note: The prohibited grounds of discrimination have developed into a quite detailed system dictating who can't do what to whom. In this chapter we look at some examples of efforts to adjudicate the scope of the Code's protection with respect to the grounds upon which discrimination is prohibited. We look at the debates over

- whether the category of disability includes discrimination against someone on the grounds of obesity,
- whether discrimination against transgendered persons is sex discrimination.
- whether family status includes relationships to particular individuals,
- whether failure to provide the same employment benefits to same sex couples as heterosexual couples enjoy is discrimination on the basis of family status,

The point of this section is not to come away with all the latest law on which categories are covered by the Code. Rather, as you read these cases, you should think about both how the scope of the legislation has been defined by the statute and how the courts have gone about interpreting those legislated parameters. What function do the categories of prohibited discrimination serve? Why do you think the legislature chose the categories it did? Could it have defined the categories differently? If you were a legislative draftsperson, how would you suggest defining them?

Do the specific categories included tell us anything important about the purpose of discrimination law?

a. Prohibited Grounds of Discrimination

i. Disability

Ontario Human Rights Commission v. Vogue Shoes

(1991), 14 C.H.R.R. D/425

Before: Ontario Board of Inquiry, Marilyn L. Pilkington

[1] This is an inquiry into a complaint by the Ontario Human Rights Commission that Vogue Shoes and George Goldford discriminated against Carolyn Maddox, now deceased, because of handicap and because of sex by requiring that she lose weight if she wished to continue to work as a shoe salesperson.

[2] Carolyn Maddox had been employed as a sales clerk by Vogue Shoes in St. Catharines for seventeen years. She left her employment in August 1985 after being told that she must lose thirty-five pounds within six weeks. She commenced an action for wrongful dismissal and also consulted with the Human Rights Commission, which issued a complaint on September 6, 1985 alleging that Vogue Shoes and its owner, George Goldford, had discriminated against her on the basis of handicap

[Exhibit 2]. The wrongful dismissal action proceeded to examinations for discovery in April 1986, but at the hearing of this complaint, had not been prosecuted further.

...

II. FACTS WITH RESPECT TO THE ALLEGED DISCRIMINATION

1. The Respondents

[31] George Goldford, through Palmer & Goldford Limited, owns and operates a shoe store in downtown St. Catharines under the trade name Vogue Shoes. ... At the Penn Centre store, there are three full-time employees and two part-time employees in addition to Mrs. Goldford who is at the store three-quarters of the time. The same products are sold at the two stores: women's footwear and accessories of a "better grade" and conventional style, with dress shoes ranging in price from $85 to $200.

[32] Mr. Goldford testified that, although the stores had employed men as sales clerks from time to time, 95 percent of the employees had been women. Mrs. Maddox was not the only long-term employee. Another woman worked for Vogue Shoes for twenty-three years. Nor was Mrs. Maddox the only employee who was overweight. Mr. Goldford identified three other women employees, including Mr. Maddox's daughter Jill English, a witness in the proceedings who were of comparable size [Transcript, p. 373].

[33] Employees were expected to dress appropriately for the presentation of the business and were also expected to keep their footwear, which was available at reduced cost, in good condition. ...

2. Carolyn Maddox

[35] In August 1985 Carolyn Maddox was 42 years old.... She had been hired by George Goldford as a full-time sales clerk at Vogue Shoes on August 15, 1968, after working in three other shoe stores or departments for a total of six years... She had completed grade twelve and also held a diploma from the Shoe Retailers Association.

[36] Mrs. Maddox worked at the downtown store with Mr. Goldford, and occasionally relieved at the Penn Centre store. It is common ground that she was a very capable shoe salesperson. She also arranged shoe displays and, when Mr. Goldford was absent (sometimes for periods of up to six weeks), she attended to the banking and deposits for the downtown store.

[37] Dr. Douglas Ralph, Mrs. Maddox's general physician, testified on the basis of his records [Exhibits 10, 10A] that Carolyn Maddox was five feet four-and-a-half inches tall, that when he began to see her as a patient she was obese, weighing 80.5 kg (177 lbs.), and that in May 1985 she weighed 90.5 kg (200 lbs.). Mr. Goldford testified that, although Mrs. Maddox's weight fluctuated, it had gradually increased over the years, and that he had considered her to be overweight for about ten years. At her examination for discovery, Mrs. Maddox testified that she had never sought advice about a program of weight reduction from Dr. Ralph or any other physician (Exhibit 7, p. 20], but Dr. Ralph's records indicate that Mrs. Maddox was concerned about her weight on a continuing basis and tried periodically to lose weight through dieting and exercise. There was no evidence that Mrs. Maddox's obesity resulted from any abnormal medical condition, nor was it the source of health problems. Dr. Ralph conducted tests, but "didn't feel obesity at her age was causing any physiological problem" [Transcript, p. 231].

[38] Mrs. Maddox was described by Mr. Goldford as "outgoing and friendly" and by her husband as "happy-go-lucky and bubbly," but her physician's records also reveal that she suffered frequently from depression and sleep disturbances. She attended at Dr. Ralph's office on a very regular basis to discuss a variety of medical conditions and a variety of personal problems independent of any problems connected with her work. Her son, who was treated for alcoholism in Buffalo, New York

> sexually will predominantly be male and those facing the greatest risk of harassment will tend to be female.

[108] Turning once again to *Bliss* and *Brooks,* in *Miron* v. *Trudel,* McLachlin J. affirmed the need to go beyond biological differences and examine social and economic contexts. She said:

> The danger of using relevance as a complete answer to the question of whether discrimination is made out, and thus of losing sight of the values underlying s. 15(1), is acute when one is dealing with so-called "biological" differences.

[109] McLachlin J. added further on:

> Following the lesson of *Brooks,* I would respectfully suggest that more is required; if we are not to undermine the promise of equality in s. 15(1) of the *Charter, we must go beyond biological differences and examine the impact of the impugned distinction in its social and economic context to determine whether it, in fact, perpetuates the undesirable stereotyping which s. 15(1) aims to eradicate.* [Emphasis added.]

[110] Whether under the aegis of s. 15(1) of the *Canadian Charter* or of s. 10 of the Quebec *Charter of Human Rights and Freedoms,* the term "sex" has much more than a taxonomic value, and exposes the great discrepancies of the binary model in terms of a classification that managed to pass for the archetype of the model itself.

[111] Like the Supreme Court of Canada in the late 1980s, which provided an extensive notion of the concept of "sex", we believe that sex does not include just the state of a person but also the very process of the unification and transformation that make up transsexualism.

[112] As we have already seen, the psychological and psychosocial components of sex in regard to transsexualism appear to be in total conflict with other genetic, hormonal and anatomical elements, which, at birth, allow a person to be distinguished as indisputably belonging to one sex.

[113] Drawing upon the aforementioned principles of interpretation of human rights, especially the inherent dignity of the human being, we can say that a transsexual person who is a victim of discrimination based on his being a transsexual may benefit from provisions against discrimination based on sex, once his transformations have been completed or, if you like, once his identification is perfectly unified.

[114] What is more, discrimination, even based on the process of the unification of disparate and contradictory sexual criteria, may also constitute sex-based discrimination while sex is at its most vaguely defined.

[115] Referring, for the purpose of analogy, once again to the question posed by Dickson C.J. in *Brooks,* in respect to pregnancy, we can affirm that it is not clear how discrimination based on transsexualism or on the process of transsexualism could ultimately be anything other than sex-based.

...

*****

Note: In Kavanagh v. Attorney General (Canada), (2002) 41 C.H.R.R D/119, an inmate in a federal prison challenged Corrections Services Canada's policy of holding male to female transsexuals in male facilities until sex reassignment surgery has been performed, and its policy of refusing to consider allowing sex reassignment surgery during incarceration. While the case focused largely on whether the policies could be justified, the Canadian Human Rights Tribunal declared that "[t]here is no dispute that discrimination on the

basis of transsexualism constitutes sex discrimination as well as discrimination on the basis of a disability."

In *Montreuil v. National Bank of Canada (No. 1)*, (2003) CHRT 27, the respondent brought a motion to dismiss a complaint brought by a job applicant who was born male, had adopted a female name and dressed as a woman, but had acknowledged that she had no intention of proceeding with sex reassignment surgery. The respondent argued that therefore she is "not a transsexual person in a period of transition in order to become female." The Tribunal refused to dismiss the complaint, saying "the question of whether an individual who describes herself as a transsexual, but has no intention of undergoing sex reassignment surgery, is indeed a transsexual, is a question that requires an evidentiary foundation to answer. As such, the issue should be dealt with in the context of the hearing itself...". At the hearing on the merits, reported at (2004) 48 C.H.R.R. D/436, the respondent declined to raise the argument that the complainant was not really a transsexual person.

iii. Family Status

B. v. Ontario (Human Rights Commission)

[2002] 3 SCC 403

The judgment of L'Heureux-Dubé, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ. was delivered by IACOBUCCI and BASTARACHE JJ.:—

I. Introduction

2 This appeal deals with the scope of two grounds of discrimination, namely "marital status" and "family status", in the context of the *Ontario Human Rights Code*, R.S.O. 1990, c.H. 19 (the "Code"). The essence of the dispute centres on whether those grounds are broad enough to encompass a situation where an adverse distinction is drawn based on the particular identity of a complainant's spouse or family member, or whether the grounds are restricted to distinctions based on the mere fact that the complainant has a certain type of marital or family status.

...

II. Facts

5 The respondent, Mr. A, was fired in September of 1990 from the appellant D Ltd., a firm owned by two brothers, Mr. C, who is the president, and Mr. B who is vice-president and manager. Messrs. B and C were brothers to Mrs. A and uncles to the daughter of Mr. and Mrs. A. At the time of his termination, Mr. A was 56 years old, had worked for 26 years with the appellant company, and was four years away from retiring on full pension. Although Mr. B was Mr. A's supervisor, most of Mr. A's work was done outside the office and he rarely saw Mr. B during the work day.

6 The background to the termination relates to an accusation by Mr. A's daughter that she was sexually molested as a young child by her uncle Mr. B. She had been in therapy for some time and could recall incidents of sexual abuse, but not the identity of her abuser. Sometime in September of 1990, she identified Mr. B as the abuser. On September 14, 1990, on the advice of her therapist, Mr. and Mrs. A, their daughter and a friend went to Mr. B's house to confront him with the allegation. Mr. A stayed in the car and was not involved in the heated exchange at Mr. B's front door. Later that evening, Mr. B called the A's home.... Mr. A refused to let Mr. B into the house and he left without incident.

****

Note: In Mossop the plaintiff declined to make a Charter argument about the exclusion of sexual orientation from the *Canadian Human Rights Act*. The Alberta anti-discrimination legislation, *The Individual's Rights Protection Act*, was challenged, though, in *Vriend v. Alberta*, [1998] 1 S.C.R. 493. The Court held that "The omission of sexual orientation as a protected ground in the *IRPA* creates a distinction on the basis of sexual orientation. The "silence" of the *IRPA* with respect to discrimination on the ground of sexual orientation is not "neutral". Gay men and lesbians are treated differently from other disadvantaged groups and from heterosexuals. They, unlike gays and lesbians, receive protection from discrimination on the grounds that are likely to be relevant to them."

After deciding that this violation of s. 15 could not be saved under s. 1, and considering the appropriate remedy, Iacobucci J. concluded that "reading sexual orientation into the impugned provisions of the *IRPA* is the most appropriate way of remedying this underinclusive legislation."

The implications for human rights code interpretation in general were considered as follows:

...

105 The respondents take the position that if the appellants are successful, the result will be that human rights legislation will always have to "mirror" the *Charter* by including all of the enumerated and analogous grounds of the *Charter*. This would have the undesirable result of unduly constraining legislative choice and allowing the *Charter* to indirectly regulate private conduct, which should be left to the legislatures.

106 It is true that if the appellants' position is accepted, the result might be that the omission of one of the enumerated or analogous grounds from key provisions in comprehensive human rights legislation would always be vulnerable to constitutional challenge. It is not necessary to deal with the question since it is simply not true that human rights legislation will be forced to "mirror" the *Charter* in all cases. By virtue of s. 52 of the *Constitution Act, 1982,* the *Charter* is part of the "supreme law of Canada", and so, human rights legislation, like all other legislation in Canada, must conform to its requirements. However, the notion of "mirroring" is too simplistic. Whether an omission is unconstitutional must be assessed in each case, taking into account the nature of the exclusion, the type of legislation, and the context in which it was enacted. The determination of whether a particular exclusion complies with s. 15 of the *Charter* would not be made through the mechanical application of any "mirroring" principle, but rather, as in all other cases, by determining whether the exclusion was proven to be discriminatory in its specific context and whether the discrimination could be justified under s. 1. If a provincial legislature chooses to take legislative measures which do not include all of the enumerated and analogous grounds of the *Charter*, deference may be shown to this choice, so long as the tests for justification under s. 1, including rational connection, are satisfied.

6 The students' attacks on Jubran took a specific form. The group of students under discussion despised homosexuals and all things associated by them with homosexuals. That is obvious. In the result, the attacks on Jubran took various forms, including calling him "homo", "queer", "gay" and preparing crude drawings saying "HOMO" or portraying him as a boy in love with another boy. Universally applicable labels such as "dork" and "geek" were also flung Jubran's way. But the heart of the attack on Jubran drew on terms that come quickly to the lips of homophobes. Jubran is not a homosexual. Of overarching importance, the Tribunal proceeded on the basis that even if it accepted as a fact that the students who attacked him did not believe Jubran to be a homosexual their conduct fell within s. 8 of the *Human Rights Code*, *infra*. For my purposes therefore the case must be approached as one in which Jubran is not a homosexual and the students did not believe him to be a homosexual. ...

9 ...[T]he material findings of fact made by the Tribunal throw up a question of law that arises under s. 8 of the *Human Rights Code* and is general in nature.

...

11 ...Jubran is not a homosexual and the students who attacked him did not believe he was a homosexual. In light of the concluding words of s. 8 "...because of the...sex or sexual orientation of that person or class of persons" is not the cruel and disgusting conduct of the students in the case at bar wholly without s. 8 of the *Human Rights Code*?

12 In my respectful view the answer to that question is simply Yes. No sensible use of the English language admits of any other conclusion. And if I am wrong in treating this question as one of general law then the application of law to a particular set of facts is afoot, the standard of review is reasonableness and the result is the same for the Tribunal's finding at step (1) (*supra*) was in turn based on an unreasonable conclusion, i.e. that s. 8 captured the conduct of the students in the case at bar. (*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554.)

13 The Supreme Court of Canada has ordered the Tribunal and me not to let the application of legislation such as s. 8 of the *Human Rights Code* slip the anchor of the words chosen by the legislature. (*U.B.C. v. Berg*, *supra*, at 678). The Tribunal's decision, and the submission placed before me by Jubran's counsel, equate discrimination through harassment by the use of hurtful words of a sexual nature with discrimination "because of the sex or sexual orientation OF THAT PERSON OR CLASS OF PERSONS". (Emphasis added). That those two things may coincide in a given case does not mean that they do coincide in every case. And here, in the case at bar, the bottom facts as found by the Human Rights Tribunal take the case wholly outside the words of the Act.

14 In the result the Human Rights Tribunal's conclusion at step 1 - that the School Board contravened s. 8 of the *Human Rights Code* - was based on an incorrect finding, i.e. that the students' conduct fell within s. 8 of the Code.

15 That being so the decision of the Human Rights Tribunal is fatally flawed and must be, and is, quashed. ...

*****

Note: In a case comment on *Jubran*, "Grading Human Rights in the Schoolyard: *Jubran v. Board of Trustees*" (2003) 36 U.B.C. Law Rev. 45, William Black argues that it would have been more in keeping with the purpose of human rights codes if homophobic harassment were prohibited regardless of the actual identity of the target or the perceptions of the harasser. He describes the purpose as follows (p. 47):

> The purpose of human rights legislation is not to deal with all types of unfairness. Instead, its purpose is to protect against discrimination related to grounds such as race, sex or sexual orientation. The reason for that focus is that discrimination related to such grounds causes harm going beyond the interests of the individuals directly affected. Discrimination on protected grounds reflects entrenched patterns of prejudice. Those patterns have detrimental consequences for society at large and it is in the public interest to provide a mechanism to eradicate such discrimination. That purpose is reflected in section 3(d) of the *Code* which provides that one purpose of the legislation is "to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this *Code*."

While he acknowledges that a "connection does have to be shown between the conduct and a prohibited ground", he argues that the connection need not be based on either Jubran's self-identification as gay or on his tormentors' perception that he is gay. Stewart J., he says, should have considered the possibility that the remarks were "based, at least in part, on the fact that [Jubran] exhibited some of the negative stereotypes about gay men."

****

North Vancouver School Dist. No. 44 v. Jubran

(2005), 52 C.H.R.R. D/1 (B.C.C.A.)

Reasons for judgment of the Honourable Madam Justice Levine (Oppal J. concurring)

INTRODUCTION

[1] This appeal raises difficult and important questions of interpretation of British Columbia's human rights legislation, the *Human Rights Code*, R.S.B.C. 1996, c. 210 (the "*Code*"). Must a person who complains of discriminatory harassment on the basis of sexual orientation actually be homosexual or perceived by his harassers to be a homosexual? Is a School Board responsible where the conduct of students violates the *Code?* The issues arise in the context of homophobic bullying in a public school.

...

SECTION 8 OF THE CODE – CAN MR. JUBRAN COMPLAIN?

[26] The principal question on the appeal from the order of the Chambers Judge is whether in order to establish *prima facie* discrimination on the basis of sexual orientation under s. 8 of the *Code*, a person must either be a homosexual or be perceived by his harassers to be a homosexual.

...

The Purposes of Human Rights Legislation

[35] Section 3 of the *Code* sets out its purposes:

3. The purposes of this Code are as follows:

(a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;

(b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;

(c) to prevent discrimination prohibited by this Code;